ΔΙΑΜΑΡΤΥΡΙΑ, ΠΑΡΑΓΡΑΦΗ, AND THE LAW OF ARCHINUS

By George Miller Calhoun

I. ORIGIN AND DEVELOPMENT OF SPECIAL PLEAS

Attic law of the fourth century admitted two forms of special plea in bar of action, *παραγραφή* and *διαμαρτυρία*. No known instance of either antedates the archonship of Euclides, and opinions differ as to their relative antiquity. The facts which may be regarded as established are as follows: *Παραγραφή*, as we find it in the procedure of Demosthenes' time, was instituted by the law of Archinus. At first it comprehended only pleas based on the amnesty of 403, but at some time during the first half of the fourth century the procedure was extended to include those brought on other grounds.[1] Prior to this extension, however, special pleas traversing the admissibility of actions were judged separately from the main issue, and the original plaintiff spoke first.[2] When this separation of special from general traverse was first practiced has not been determined, nor has it been established that the term *παραγραφή* was applied to special pleas prior to the enactment of the law of Archinus.[3]

There can be no reason for doubting the assertion with which Isocrates' speech *Against Callimachus* opens, that this is the first special plea based on the law of Archinus which has come before a court. The speaker begins: *Εἰ μὲν καὶ ἄλλοι τινὲς ἦσαν ἠγωνισμένοι τοιαύτην παραγραφήν, ἀπ' αὐτοῦ τοῦ πράγματος ἠρχόμην ἂν τοὺς λόγους ποιεῖσθαι· νῦν δ' ἀνάγκη περὶ τοῦ νόμου πρῶτον εἰπεῖν, καθ' ὃν εἰσελη-λύθαμεν, ἵν' ἐπιστάμενοι, περὶ ὧν ἀμφισβητοῦμεν, τὴν ψῆφον φέρητε, καὶ μηδεὶς ὑμῶν θαυμάσῃ, διότι φεύγων τὴν δίκην πρότερος λέγω τοῦ διώκοντος.*

[1] *MSL*, pp. 852 ff.; Wilamowitz, *Aristoteles und Athen* (Berlin, 1893), II, 368–69; Glotz in *Daremberg et Saglio Dict. Ant.*, IV, 325 (*s.v.* "Paragraphè"); Kennedy, *The Orations of Demosthenes* (London, 1894), III, 379; Lipsius, *Das Attische Recht und Rechtsverfahren* (Leipzig, 1905–15), pp. 846–47.

[2] *MSL*, p. 853; Wilamowitz, *op. cit.*, p. 369; Lipsius, *Recht*, p. 846. The basis for this conclusion is the case in which the undated speech of Lysias *Against Pancleon* was delivered. The original plaintiff speaks first and the argument is confined to the special plea, to which the general term *ἀντιγραφή* is applied.

[3] *MSL*, pp. 852 ff.; Lipsius, *Recht*, pp. 846–47.

Manifestly a *παραγραφή* is no new thing to the jury, the particular features of this kind of *παραγραφή* (*τοιαύτην*) are what require explanation. These, the speaker states, are primarily the point raised by the *παραγραφή* (*περὶ ὧν ἀμφισβητοῦμεν*) and the fact that the original defendant speaks first. In the opinion of the writer, this clearly establishes that the separate hearing of special pleas was not unknown prior to the passage of the law of Archinus, and that to some of these special pleas the name *παραγραφή* was given.

This is confirmed by the phrasing of the law itself, of which we find in the next section what is to all appearances a complete and accurate quotation: *ἄν τις δικάζηται παρὰ τοὺς ὅρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δέ πρότερον τὸν παραγραψάμενον, ὁπότερος δ' ἂν ἡττηθῇ, τὴν ἐπωβελίαν ὀφείλειν.* Evidently *παραγράψασθαι* refers to a pre-existent process, which is applied, with its terminology and procedure, to actions that contravene the amnesty. Stripped of the provisions which the speaker describes as innovations, the earlier procedure appears to have been about as follows: A defendant, when called on to plead, stated his exception and got the magistrate to make note of it (*παρεγράψατο*) on the written plaint. In the action brought against Pancleon[1] by Aristodicus, the defendant seems to have adopted this course in entering a special plea, which was in this instance interrupted by the plaintiff's *διαμαρτυρία*. In case the defendant incorporated the exception into his pleading, as Pancleon did in his later litigation (*ἀντεγράψατο*), the special plea itself was called *ἀντιγραφή*.[2]

In the Herodes "murder" case the defendant devotes a considerable part of his argument to the contention that the offense with which he stands charged properly does not admit of *ἔνδειξις* and *ἀπαγωγή* in the court of the Eleven.[3] Wilamowitz,[4] followed by Lipsius,[5] argues from this that special pleas interposing formal objections could not have been judged separately prior to 415. The

[1] Lys. 23. 13: *ἐν τῇ ἀντωμοσίᾳ γὰρ τῆς δίκης ἦν αὐτῷ ἔλαχεν Ἀριστόδικος οὑτοσί, ἀμφισβητῶν μὴ πρὸς τὸν πολέμαρχον εἶναί οἱ τὰς δίκας, κτλ.* Wilamowitz (*op. cit.*, pp. 369–70) analyzes the proceeding incorrectly when he finds in it a parallel to the Herodes case, as Lipsius has noted (*Recht*, p. 847, n. 5).

[2] Lys. 23. 10.

[3] Ant. 5. 8–18; cf. 85–96.

[4] *Op. cit.*, p. 369.

[5] *Recht*, p. 847.

logic on which this conclusion is based is sadly at fault. What might hold true of ἔνδειξις surely cannot be applied to all legal actions. It would be just as reasonable to argue from the Agoratus case, where similar formal objections are anticipated by the accuser, that παραγραφή was not practiced in 398, a manifest absurdity.[1] The Herodes speech can prove at the most only that about 415 a plea to the jurisdiction could not intervene in ἔνδειξις.[2] As a matter of fact there is absolutely no evidence as to when the separate hearing of special pleas was first practiced.

As regards the relative antiquity of παραγραφή and διαμαρτυρία, there is a great diversity of opinion. Lipsius believes the question cannot be answered.[3] Leisi is inclined to assign the introduction of both processes to the archonship of Euclides.[4] Glotz regards παραγραφή as an outgrowth of διαμαρτυρία, which was the more ancient.[5] Apparently this view is based solely on his assumption that διαμαρτυρία was "une vague survivance de l'antique conjuration," for he offers no other proof. But the question must be considered in the light of the conclusions that have been reached above. Διαμαρτυρία unquestionably antedates the παραγραφή of Archinus. This is established by a circumstance of which the effect apparently has not hitherto been noticed. In the very speech which describes this παραγραφή as an innovation and explains it in detail, a case of διαμαρτυρία is casually alluded to as a proceeding with which the jury is perfectly familiar.[6] On the other hand it cannot be demonstrated that

[1] Agoratus is charged with having compassed the death of a number of prominent democrats by filing informations against them (Lys. 13. 2: ἀπέκτεινε, μηνυτὴς κατ' ἐκείνων γενόμενος). The basis of the prosecution throughout is that he "slew" (cf. ἀπέκτεινε, *loc. cit.*, and 42, 63, 64, 84, 85), and the speaker repeatedly demands his condemnation as a "slayer" (cf. φονεύς, 33, and φονέα, 42, 92, 93). But, precisely as in the Herodes case (cf. Jebb, *The Attic Orators from Antiphon to Isaeus* [London, 1893], I, 267), he has been proceeded against by ἔνδειξις and ἀπαγωγή in the court of the Eleven. The case has come into court on the main issue, but the speaker foresees that the defendant will ask an acquittal on the special grounds (1) that this form of action is not admissible on the basis of the offense with which he is charged, and (2) that the amnesty applies. The situation is identical with that in the Herodes case, save that here there are two grounds on which the special plea may be urged.

[2] On the admissibility of special pleas in public actions, see below, pp. 179 ff.

[3] *Recht*, p. 847.

[4] *Der Zeuge im Attischen Recht* (Frauenfeld, 1908), pp. 29–30.

[5] *Daremberg et Saglio*, IV, 324–25. This view is adopted by Wyse, *Isaeus*, p. 232.

[6] Isoc. 18. 11–12.

διαμαρτυρία is more ancient than the forms of special pleading, παραγραφαί and ἀντιγραφαί, that preceded 403. It is true that the terms παραγραφή and ἀντιγραφή cannot have been employed prior to the introduction of written plaints, but this goes as far back as our earliest sources for Attic law.[1]

To sum up these conclusions briefly, the course of development was as follows: Prior to the archonship of Euclides a defendant could enter an exceptive plea by incorporating it into his pleading (ἀντιγραφή), or by getting the magistrate to note it on the plaint (παραγραφή), or by putting forward a witness (διαμαρτυρία).[2] The second mode of procedure was applied by Archinus to cases in which the amnesty was made the ground for the exception, and later it completely superseded the first, so that in the time of Demosthenes all special pleas were introduced either by παραγραφή or by διαμαρτυρία.[3]

II. THEIR RESPECTIVE SCOPE AND FUNCTIONS

Διαμαρτυρία and παραγραφή were quite distinct from one another in form, though similar in effect. The procedure is for the most part well established; its details have been set forth repeatedly and the contrasts emphasized.[4] But here apparently investigation has stopped. The purposes which were served by providing two forms of plea, and the precise limits within which these were severally admissible, have received but slight attention. Dareste undertook unsuccessfully to establish the distinction that διαμαρτυρία involved a

[1] Cf. [Xen.] *Cons. Ath.* 3. 2.

[2] The theory of Schoemann that ἐξωμοσία was a form of special plea which was superseded in the fourth century by παραγραφή rests on an ancient misinterpretation of Aristoph. *Eccl.* 1026. Cf. Lipsius, *Recht*, p. 847, n. 6, p. 902, n. 3 *fin.* Wilamowitz is of course correct in assuming that there was a time when exceptive pleas were not given separate consideration, but his erroneous inference from the Herodes case leads him to put into the brief compass of less than twenty years a process of development that probably occupied a longer time.

[3] Although originally a παραγραφή was no doubt simply a notation affixed by the magistrate to the plaint, as παραγράφεσθαι implies, by the time of Demosthenes it had apparently taken the form of a separate document, drawn up by the defendant, which might attain formidable dimensions if the traverse was based on several grounds. Cf. Dem. 37. 34: τοῦτο τοίνυν ἐμοῦ παραγεγραμμένου πρὸς τῇ ἄλλῃ παραγραφῇ . . . . ἐξαλήλιπται καὶ οὐ πρόσεστι τῇ παραγραφῇ.

[4] Platner, *Der Process und die Klagen bei den Attikern* (Darmstadt, 1824), I, 138–74; *MSL*, pp. 841 ff.; Glotz, *op. cit.*, pp. 324–25; Kennedy, *op. cit.*, III, 378–80; Lipsius, *Recht*, pp. 854 ff. On διαμαρτυρία see also Leisi, *op. cit.*, pp. 28–34.

positive assertion of fact.[1] Others deny expressly or by implication that there was any fundamental distinction of purpose between the two forms. Kennedy[2] assumes, and Glotz[3] affirms, that they were identical in scope and intention. Platner rather vaguely characterizes *διαμαρτυρία* as "eine Art Paragraphe,"[4] employed under circumstances "nirgends bemerkt, vermuthlich aber dann, wenn ohne die Einwendung derselben ein Rechtsverlust zu befürchten steht, also z.B. in dem Fall, wenn zwei über eine Sache streiten, woran einem Dritten Rechte zustehen."[5] Lipsius in *Der Attische Process* regarded the two pleas as identical, save in form, applicable alike to public and to private actions, with the sole distinction that in inheritance cases *διαμαρτυρία* only is found.[6] In his later work he notes that the law *περὶ ὧν μὴ εἶναι δίκας* apparently made no distinction in regard to the applicability of the two forms, but that in the majority of the *παραγραφή* cases which have come down to us exceptions that are not final are raised.[7] He now doubts that either plea was admissible in public actions.[8] Nowhere does he suggest that there was any essential difference between them in intent or scope.

Now we have seen that *παραγραφή* completely superseded the practice of incorporating special pleas into the general traverse. Clearly this was because it served the same purpose and was more direct and expeditious.[9] Consequently the very fact that *διαμαρτυρία*, which was more troublesome than *παραγραφή* and attended with greater risk,[10] continued to be employed throughout the fourth century suggests that the functions of the two proceedings differed materially.

[1] *Les Plaidoyers civils de Demosthene*, p. xx. Lipsius has observed that in some cases this holds true of *παραγραφή* as well (*Recht*, p. 847, n. 6 *fin.*).

[2] *Loc. cit.* [3] *Loc. cit.* [4] *Op. cit.*, p. 163.

[5] *Ibid.*, p. 164. Platner constantly confuses *διαμαρτυρία* with the formal "protest" (*διαμαρτύρεσθαι*). Cf. Leisi, *op. cit.*, p. 32, n. 2, p. 160.

[6] Pp. 841–42. [7] *Recht*, pp. 847–49. [8] *Ibid.*, p. 858.

[9] A defendant would ordinarily not wish to draw up an *ἀντιγραφή* covering all the contentions of the plaintiff if he intended to bring his case before the court on a single issue.

[10] In *διαμαρτυρία* a witness had to be secured to attest the formal deposition. This witness was liable, in case of conviction, to the penalties provided for perjury, a fine, and in some cases probably disfranchisement, while the principal exposed himself to the dangers of a *δίκη κακοτεχνιῶν*. See the writer's "ΕΠΙΣΚΗΨΙΣ and the ΔΙΚΗ ΨΕΤΔΟΜΑΡΤΤΡΙΩΝ," *Class. Phil.*, XI (1916), 386 ff.; Lipsius, *Recht*, p. 857, n. 41 *fin.*; Wyse, *Isaeus*, p. 233.

Furthermore, we find that the cases in which they were severally employed are sharply differentiated in practice. In inheritance cases there is no instance of παραγραφή; where a special plea intervenes, it invariably takes the form of a διαμαρτυρία. On the other hand, in other classes of civil suits formal exceptions are uniformly introduced by παραγραφή, save in two cases, and those of early date.[1] So marked a line of cleavage can scarcely have been accidental. Two explanations only are possible. Either the classes of actions to which these pleas were severally applicable were expressly distinguished by law, or differences in practical working determined the choice of one or the other.

The soundness of the first explanation may be tested to some extent by an examination of the legal quotations and allusions found in the arguments that have to do with παραγραφή cases. Lipsius and Glotz have adequately established the grounds on which special pleas were based and have classified the decrees of court to which they gave rise as final or interlocutory.[2] But they have given little attention to the precise form in which these principles were legally enacted. The problem is by no means so simple as might be inferred from the statement of Lipsius that "Ueber die Rechtsfälle der ersteren Art [final exceptions] handelt das Gesetz περὶ ὧν μὴ εἶναι δίκας."[3] While a number of grounds for final decrees were, in the Demosthenic period, comprehended in this law,[4] it is clear that others were distributed throughout a great many enactments. For example, the law of Archinus provided for παραγραφαί based on the amnesty,[5] and we know of at least three different laws under which προθεσμία was pleaded.[6] Similarly a number of enactments contained clauses on the basis of which interlocutory decrees might be sought, such as those on which pleas to the jurisdiction were based in mercantile and

[1] On these two instances (Isoc. 18. 11; Lys. 23. 13) see below pp. 178 f. For other διαμαρτυρίαι see Isaeus *Oratt.* 2, 3, and 6; [Dem.] *Orat.* 44; Isaeus 5. 16. For παραγραφαί see Isoc. *Orat.* 18; Lys. *Orat.* 23; Dem. *Oratt.* 32, 36, 37, and 38; [Dem.] *Oratt.* 33, 34, and 35.

[2] Lipsius, *Recht*, pp. 847 ff.; Glotz, *loc. cit.*

[3] *Recht*, p. 848.

[4] Dem. 36. 25; 38. 5.

[5] Above, pp. 169 f.

[6] These are (1) ὁ τῆς προθεσμίας νόμος (Dem. 36. 26), (2) the law governing actions against guardians (Dem. 38. 18), (3) the law governing guaranties ([Dem.] 33. 27).

mining cases.[1] In the opening paragraphs of speeches that have to do with special pleas we find such expressions as ἐπὶ τὴν παραγραφὴν καταφεύγειν ἔδωκεν ὁ νόμος,[2] οἱ . . . . νόμοι . . . . παραγράφεσθαι δεδώκασιν,[3] δεδωκότων . . . . τῶν νόμων παραγράψασθαι.[4] This at first sight suggests that the laws explicitly prescribed παραγραφή. But other portions of these speeches, in which are found unmistakable quotations, usually repeated after the reading of the law by the clerk, give us more nearly the actual phrasing of these sections of the laws. Thus we find that the enactment regulating mercantile actions contained the clause ἐὰν δέ τις παρὰ ταῦτα δικάζηται, μὴ εἰσαγώγιμον εἶναι τὴν δίκην.[5] The content of the law governing final exceptions to which allusion has been made is summed up in the phrase περὶ ὧν μὴ εἶναι δίκας. The following excerpts are found: περὶ ὧν ἄν τις ἀφῇ καὶ ἀπαλλάξῃ, μὴ δικάζεσθαι,[6] ὧν ἂν ἅπαξ γένηται δίκη, μηκέτ' ἐξεῖναι δικάζεσθαι,[7] ὧν ἂν ἀφῇ καὶ ἀπαλλάξῃ τις, μηκέτι τὰς δίκας εἶναι.[8] In the law concerning actions against guardians we find the clause ἐὰν μὴ πέντ' ἐτῶν δικάσωνται, μηκέτ' εἶναι δίκην.[9] In other laws containing exceptions are found καὶ δίκη . . . . μὴ ἔστω . . . . μηδὲ ἀρχὴ εἰσαγέτω περὶ τούτου μηδεμία,[10] and μὴ εἰσάγειν περὶ τούτων εἰς τὸ δικαστήριον μηδ' ἐπιψηφίζειν τῶν ἀρχόντων μηδένα, μηδὲ κατηγορεῖν ἐώντων, ἃ οὐκ ἐῶσιν οἱ νόμοι.[11] From these passages one is led to conclude that in general the laws did not prescribe the form to be employed in pleading exceptions.[12] Enactments governing final exceptions contained merely such formulas as μὴ ἔστων δίκαι, μὴ δικαζέσθων, μὴ ἐξέστω δικάζεσθαι, μὴ ἀρχὴ εἰσαγέτω, and the like, singly or in various combinations. Exceptions leading to interlocutory decrees seem to

[1] For example Dem. 32. 1; [Dem.] 33. 1–3; 34. 4; Dem. 37. 35–39.

[2] [Dem.] 33. 2.

[3] [Dem.] 34. 4.

[4] Dem. 37. 1; 38. 1.

[5] Dem. 32. 1.

[6] Dem. 38. 5.

[7] Dem. 36. 25.

[8] Dem. 37. 19.

[9] Dem. 38. 18.

[10] [Dem.] 35. 51. The authenticity of this law, as well as of the other documents in the speech, has been questioned, but there is good ground for accepting it as genuine. See Blass, *Attische Beredsamkeit*, III, i (1893), 562, n. 4.

[11] Dem. 24. 54. This law also has been attacked as spurious, but is probably genuine. See Weil, *Les Plaidoyers politiques de Dem.*, II, 67 ff.

[12] The exception made in regard to the law of Archinus was no doubt necessitated by the circumstances of its enactment. See above, p. 170.

have been provided in the clause *ἐὰν δέ τις παρὰ ταῦτα δικάζηται, μὴ εἰσαγώγιμος ἔστω ἡ δίκη*, at the end of laws which called for special procedure.[1] There is no ground for assuming the existence of a general statute which defined the application of *διαμαρτυρία* and *παραγραφή*, and it is a priori unlikely. Consequently it seems probable that the form which the special plea was to take was prescribed only in exceptional cases, and that the sharp distinction we have noted in practice was due to considerations of convenience and efficiency. What these were remains to be determined.

Inasmuch as *παραγραφή* was an answer to a specific plaint, it effected a bar of action only in the particular suit in which it was pleaded. This is quite clear from the form that the pleading takes. It makes no direct affirmation except that the plaint is inadmissible (*τὴν δίκην μὴ εἰσαγώγιμον εἶναι*).[2] Consequently the judicial decision to which it gives rise affects only the present plaint and cannot constitute a bar to action by another party, or by the same party on other grounds or in a different form, unless it be established that the exception pleaded applies to the new action as well. This obviously requires a new *παραγραφή*, based on the new plaint. It at once becomes clear that this form of special plea was quite impracticable in the case of a *διαδικασία κλήρου*, where there were often a number of suitors who based their claims on different grounds; for the successful maintenance of a *παραγραφή* against one suitor would in no wise prejudice the claims of the others, nor would it operate to bar future litigation by still other parties. But *διαμαρτυρία* was subject to no such limitation, and it consequently provided a convenient means of establishing legally an indefeasible title and thereby effectively barring all other claims. Thus a son or daughter whose title to the father's estate was contested could oppose any and all

[1] Compare the clause in the Alexandrian law regarding perjury prosecutions (*P. Hal.* i. 36 ff.: *τῶι δὲ παρὰ τὰ γεγραμμένα ποιοῦντι μὴ εἰσαγώγιμος ἡ δίκη ἔστω*). From the citations given above it is seen that in the phraseology of the laws the tendency is to use *μὴ ἔστω δίκη* or an equivalent expression in the case of final exceptions, and *μὴ εἰσαγώγιμος ἔστω ἡ δίκη* where the exception seeks a decree of merely interlocutory effect. But in drawing up a *παραγραφή* the one phrase *μὴ εἰσαγώγιμον εἶναι τὴν δίκην* apparently was employed for both classes of exceptions (cf. Dem. 32. 1, 24; 36. 24; 37. 1, 17; 38. 1, 3; 45. 5, 40, 76, 81; [Dem.] 33. 3; 35. 45; cf. 34. 43). This obviously was because the prohibitory formulas of the law would have been out of place in a pleading.

[2] Cf. above, pp. 175 f. and the preceding note.

claimants by a single διαμαρτυρία, which did not specifically attack the basis of any particular claim but opposed a general bar to all by directly affirming that the estate was "not claimable at law," by reason of the existence of legitimate sons or daughters (μὴ ἐπίδικον εἶναι τὸν κλῆρον τὸν τοῦ δεῖνος, ὄντων αὐτῷ παίδων γνησίων).[1] This proceeding had the very distinct advantage of bringing the claims of sons or daughters at once before the court and thus creating a definite issue, which would be examined by itself and not confused by the introduction of argument and testimony relating to other claims.[2] It is clear that when the court by its verdict affirmed the pleading of the witness, that he "gave true testimony,"[3] it legally established a title that effectually barred, not only other present claims, but also those that might be set up in the future.

It may be objected that a παραγραφή also might be so drawn up as to maintain a title by the words μὴ ἐπίδικον εἶναι. Conceivably it might, but there is no evidence that it ever was so phrased, for the formula μὴ εἰσαγώγιμον εἶναι is found invariably.[4] When we consider that παραγραφή was originally and essentially an objection to a particular plaint, at first probably indorsed on the document itself,[5] we are led to conclude that μὴ εἰσαγώγιμον εἶναι had become an invariable formula. And even if it had been allowable to alter this formula, a παραγραφή would still have been limited in its immediate effect to the particular claim against which it was filed, and against other claims would have had only the value of a precedent, making necessary a troublesome multiplication of legal steps, as has been observed.[6] In view of these considerations and the fact that we find no instance of a παραγραφή in an inheritance case, we may conclude that διαμαρτυρία was invariably employed. There is no evidence

[1] It seems to be the prevailing opinion that testamentary heirs were not entitled to the privilege of διαμαρτυρία (*MSL*, p. 606, n. 328; Wyse, *op. cit.*, p. 234). But this is based on the assumption that the right of διαμαρτυρία was inseparable from that of ἐμβάτευσις, which is not, in the opinion of the writer, adequately established by the evidence.

[2] This obscuring of the issue in a διαδικασία κλήρου is complained of in [Dem.] *Orat.* 43, especially 7 ff.

[3] Cf. the ἀντιγραφή in a δίκη ψευδομαρτυρίων in Dem. 45. 46.

[4] Cf. above, p. 176, n. 1.

[5] Cf. above, p. 170.

[6] Cf. above, p. 176.

on which we can affirm that this was the result of a legal prescription.[1] In certain other *διαδικασίαι* also there was properly neither plaintiff nor defendant, and there might be a number of suitors claiming on different grounds.[2] Clearly in these also *παραγραφή* could not well have been employed, and if special pleas were introduced it must have been by *διαμαρτυρία*.

Here then we have the essential difference between *διαμαρτυρία* and *παραγραφή*, a difference of practical working and effect. This it was which determined the use of one or the other in a given class of cases and thereby gave rise in the fourth century to the marked cleavage to which attention has been directed. In pleading an exception of merely interlocutory effect, or in opposing a bar to ordinary civil suits, where in general the right of action was reposed in a single individual, *παραγραφή* sufficed, and was uniformly preferred to *διαμαρτυρία* because it was easier and attended with less risk, while it gave the original defendant the right of first addressing the jury. But in those forms of litigation in which the right of action was not thus restricted, *διαμαρτυρία* was employed as an effective means of legally establishing a title or a fact that constituted a final bar of action.

There seems to be no doubt that this distinction was strictly adhered to in the Demosthenic period, for not a single exception is found.[3] From an earlier time we have two cases of *διαμαρτυρία* in ordinary civil suits, but neither can be regarded as establishing any deviation from the later practice. For one of them is the only known instance of *διαμαρτυρία* by a plaintiff. Since a plaintiff was allowed no choice, but was restricted to *διαμαρτυρία* irrespective of the nature

[1] The evidence scarcely justifies the sweeping assertion of Leisi (*op. cit.*, p. 29) and Beauchet (*op. cit.*, III, 596, n. 2) that *παραγραφή* was inadmissible in inheritance cases, an assumption which is based solely on the fact that we have no instances. But Lipsius, who rejects Leisi's view, is quite as far from an appreciation of the facts (cf. *Recht*, p. 849, n. 12 *fin.*: "Gerade für Erbstreitigkeiten empfahl sich die Diamartyrie durch das bei ihr mögliche abgekürzte Verfahren; wenn wir für sie in unseren Quellen Paragraphe nicht in Anwendung gebracht finden, möchte ich daraus noch nicht mit Leisi folgern, dass sie in ihnen gar nicht zulässig gewesen sei."). Evidently neither Leisi nor Lipsius has taken account of the difficulties that would arise from the employment of *παραγραφή* in cases of this kind.

[2] These were notably the *διαδικασίαι ἐπικλήρου, ἐπιτροπῆς, ἱερωσύνης, γερῶν*. Cf. Lipsius, *Recht*, pp. 463 ff.

[3] Cf. above, p. 173.

of his plea, it is obvious that the distinction which has just been drawn does not apply here.[1] And in the other the fact that the magistrate disregarded the defendant's διαμαρτυρία and permitted the plaintiff again to bring the same suit, without having proceeded against the witness of the defendant, suggests that there must have been some irregularity in the use of διαμαρτυρία.[2]

III. THEIR ADMISSIBILITY IN PUBLIC ACTIONS—THE LAW OF ARCHINUS

The foregoing conclusions and the evidence on which they are based relate entirely to civil litigation. The admissibility of special pleas in public actions has not been established. Until very recently it was assumed, apparently on purely a priori grounds.[3] But Lipsius in his latest discussion doubts that either form of plea was admissible in public actions, on no other ground, however, than the absence of convincing evidence.[4]

There is no allusion to the use of παραγραφή in any but private suits, and it would seem that the lack of systematic and complete court records[5] must have rendered this form of plea ineffective for interposing a final bar to any ground of public action.[6] But in a majority

[1] Lys. 23. 13–14. This aspect of the case apparently escaped the notice of Lipsius (*Recht*, p. 849, n. 12).

[2] Isoc. 18. 11–12. The language of the speaker suggests, doubtless intentionally, connivance on the part of the magistrate in an improper proceeding (cf. 12: πείσας δὲ τὴν ἀρχήν), but the details of the case are not clear, and we do not know the grounds on which the ruling was based. Lipsius is clearly wrong in his analysis of the case (*MSL*, p. 844, n. 221; *Recht*, p. 857, n. 41), and the view of Heffter (*Die athenäische Gerichtsverfassung* [Köln, 1822], p. 353, n. 13), which he rejects, is the correct one. It is inconceivable that a plaint in a δίκη βλάβης could be so drawn up as to preclude the admissibility of a διαμαρτυρία based on compromise and arbitration. Obviously the defendant resorted to παραγραφή because, as Heffter suggested, the ruling of the magistrate that had once made διαμαρτυρία ineffective would surely do so again.

[3] *MSL*, p. 841; Platner, *op. cit.*, pp. 138 ff.; Glotz, *op. cit.*, p. 324; Kennedy, *op. cit.*, p. 379.

[4] *Recht*, p. 858.

[5] Bonner (*Evidence in Athenian Courts* [Chicago, 1905], p. 60) presents evidence which tends to show that the records of judicial decisions were by no means complete or adequate.

[6] Unless an official record of the pleadings and verdict could be produced, a second παραγραφή would be required to show that the exception previously pleaded and sustained by the court was such as to constitute a bar to the action in hand. Cf. above, pp. 176 f.

of cases the defendant would have been content to bar the specific action, and for this παραγραφή would have been sufficient. Certainly neither the limitations of παραγραφή nor the fact that we have no instance of its use in a public cause justify us in denying its admissibility. However, if the writer's analysis of the legislation by which the amnesty was applied and made effective in the archonship of Euclides is correct, more convincing evidence is to be found in the law of Archinus and in the record of certain actions in which the amnesty was involved.

Kennedy goes so far as to assert that παραγραφή was first instituted in the interest of those who were prosecuted for past political offenses, and that its use in civil litigation was an extension of its original functions.[1] This view goes back to Platner, who, without distinguishing between public and private actions, explains παραγραφή as a measure intended to establish and define by court decisions the precise application of the amnesty, which was necessarily general in its provisions.[2] But it is strange that Platner did not observe the striking circumstance that in not a single case of those he cited to establish the presence of this intention was παραγραφή employed. Not a public action in which the amnesty was an issue was brought into court on a special plea, and the only instance of παραγραφή is in a private suit for damages. If the law of Archinus was enacted in order to assure to political offenders the protection of the amnesty, why was it not invoked by Andocides,[3] by Agoratus,[4] by Philon,[5] by those who were accused at their δοκιμασίαι of complicity with the Thirty?[6] Why do all these defendants place their main reliance on the amnesty, and yet neglect to avail themselves of the distinct advantages which παραγραφή conferred? We are forced to the conclusion that the plea was admissible only in private suits, and not in

[1] *Op. cit.*, p. 379.

[2] *Op. cit.*, pp. 138 ff., especially pp. 149–58.

[3] *Orat.* 1. Andocides makes an elaborate argument on the ground of the amnesty (81–99).

[4] Lys. *Orat.* 13. For the details of this case, cf. above, p. 171, n. 1.

[5] For the ἔνδειξις against Philon and the nature of his defense, cf. Isoc. 18. 22. That Philon did not resort to παραγραφή appears from the words with which the speech begins.

[6] Lys. *Oratt.* 16, 25, 26, and 31. In *Orat.* 25 the case has come before a jury court by appeal.

public causes or in δοκιμασία. While this view may at first sight seem startling, a careful analysis of the amnesty and the accompanying legislative enactments will show that it is not unreasonable. For it will be seen that παραγραφή was not the only legal safeguard of the amnesty, as Platner and others seem to assume, but was merely one step in a succession of legal enactments by which the amnesty was affirmed and its precise application defined.

The amnesty, as arranged by the Lacedaemonian commission and sworn to by both factions, contained the general provision τῶν δὲ παρεληλυθότων μηδενὶ πρὸς μηδένα μνησικακεῖν ἐξεῖναι, πλὴν πρὸς τοὺς τριάκοντα, κτλ.[1] When the next step, the establishment of a system of government, was begun, it became necessary to make a definite and specific application of this general principle. After the βουλή and the five hundred nomothetes had examined severally the laws proposed and had caused those which were approved to be duly inscribed, in accordance with the resolution of Tisamenus, a number of general statutes were enacted to regulate the administration of these laws and to prevent their abuse.[2] One of these affirmed and applied the principle of the amnesty in the following language: τὰς δὲ δίκας καὶ τὰς διαίτας κυρίας εἶναι, ὁπόσαι ἐν δημοκρατουμένῃ τῇ πόλει ἐγένοντο. τοῖς δὲ νόμοις χρῆσθαι ἀπ' Εὐκλείδου ἄρχοντος. Very fortunately Andocides gives in distinct terms what was unquestionably the construction placed upon this law by the Athenians in the times immediately following its enactment: τὰς μὲν δίκας ὦ ἄνδρες καὶ τὰς διαίτας ἐποιήσατε κυρίας εἶναι, ὁπόσαι ἐν δημοκρατουμένῃ τῇ πόλει ἐγένοντο, ὅπως μήτε χρεῶν ἀποκοπαὶ εἶεν μήτε δίκαι ἀνάδικοι γίγνοιντο, ἀλλὰ τῶν ἰδίων συμβολαίων αἱ πράξεις εἶεν· τῶν δὲ δημοσίων ἐφ' ὁπόσοις ἢ γραφαί εἰσιν ἢ φάσεις ἢ ἐνδείξεις ἢ ἀπαγωγαί, τούτων ἕνεκα τοῖς νόμοις ἐψηφίσασθε χρῆσθαι ἀπ' Εὐκλείδου ἄρχοντος.[3] We have here a striking distinction between private litigation and public actions. The laws governing public actions and prosecutions for political offenses were not retroactive; they were not to hold of any act committed prior to the archonship of Euclides (τοῖς δὲ νόμοις τοῖς κειμένοις χρῆσθαι ἀπ' Εὐκλείδου ἄρχοντος).[4] Thus the amnesty was so interpreted as to provide full and complete immunity for all offenses which antedated the

[1] Ar. *Cons. Ath.* 39. 6; cf. Xen. *Hell.* 2. 4. 38 ff.; And. 1. 81 ff.

[2] And. 1. 82 ff., especially 87. [3] *Ibid.*, 88. [4] *Ibid.*, 89.

restoration, and not merely for those connected with the Thirty.[1] The impossibility of extending this ruling to private suits was manifest; it would at once have rendered all titles to property null and void and would have provoked an endless chaos of litigation. Therefore it was expressly affirmed in the law that all decisions of courts or arbitrators rendered under the democracy were to be valid. This clause seems on the face of it to treat alike the judgments in public and in private actions and to contain no hint of the distinction drawn by Andocides, for *δίκας* in the sense it must here bear of "court decisions" would certainly not exclude verdicts rendered in public causes. But it must be remembered that shortly before the capitulation, in accordance with the resolution of Patroclides, all court sentences and condemnations, save a specified few, had been expressly abrogated and revoked and all records of such sentences destroyed, and that in addition all actions pending in connection with official audits had been quashed.[2] Consequently the law Andocides quotes had precisely the effect he describes. All court decisions rendered under the democracy in private causes were reaffirmed, while the slate was practically wiped clean as regarded public prosecutions.

From the first, apparently, it was the sense of the amnesty that property rights which had existed prior to the revolution should be re-established.[3] But this was not in every case a simple matter, as Platner observes.[4] For in the course of the confiscations instituted by the Thirty considerable property had been dissipated or had passed into the hands of private individuals. Clearly the law which has been quoted, while it forbade that public actions be based on circumstances which antedated the amnesty, left the door open for private litigation. The clause affirming court decisions may even have prompted injured persons to seek redress by this means. It must have resulted in many suits that infringed upon the liberal and generous interpretation of the amnesty favored by the leaders

[1] Andocides brings this out clearly and insists upon it repeatedly in describing the several enactments (e.g., 82: *τῶν νόμων . . . . πολλοὺς ὄντας οἷς πολλοὶ τῶν πολιτῶν ἔνοχοι ἦσαν τῶν πρότερον ἕνεκα γενομένων*; 86: *πολλοῖς τῶν πολιτῶν εἶεν συμφοραί, τοῖς μὲν κατὰ νόμους, τοῖς δὲ κατὰ ψηφίσματα πρότερον γενόμενα*).

[2] *Ibid.*, 73–80. Cf. Busolt, *Gr. Gesch.*, III, 1626–27.

[3] Xen. *Hell.* 2. 4. 38: *ἀπιέναι δὲ ἐπὶ τὰ ἑαυτῶν ἕκαστον*; cf. Underhill's note *ad loc.*

[4] *Op. cit.*, pp. 151 ff.

of the restored democracy,[1] and it must have opened an inviting field to the professional sycophant.[2] To curb this gentry and to preserve the spirit of the amnesty in the fullest sense, Archinus proposed and the δῆμος adopted this law permitting defendants to file a plea in bar of any civil suit which contravened the amnesty. That this was the purpose of the enactment, and that it was intended to apply only to civil litigation is indicated by still other considerations than those set forth above. In the first place, the phrasing of the law can be satisfactorily explained only on the supposition that it was intended to apply to civil litigation. The prescription of ἐπωβελία is in itself a serious objection to the view that the law comprehended public as well as private causes,[3] and the clause ἄν τις δικάζηται παρὰ τοὺς ὅρκους, which defines the scope of the enactment, expressly limits its application to civil cases if we understand δικάζηται in its normal and proper sense.[4] Furthermore, Archinus was the most enthusiastic proponent of the amnesty, the most uncompromising champion of those who demanded that the spirit as well as the letter of the agreement be scrupulously observed. He it was who kept many of the city party from fleeing in their first panic to Eleusis and who later successfully resisted the attempt to swell the majority of the extreme democrats by the creation of new citizens;[5] he it was who haled before the βουλή a man who undertook to disregard the amnesty and persuaded the members to put him to death, summarily, without trial, as an example for others.[6] Are we to believe that Archinus would have proposed for those who sought to bring political

[1] Isoc. 18. 23 ff. [2] *Ibid.*, 2.

[3] Ἐπωβελία is found only in connection with private actions (Lipsius, *Recht*, p. 937). Assuredly it would not here have been prescribed if the παραγραφή had been intended to apply to public as well as private actions. It is a conclusive objection to Kennedy's view (cf. above, p. 180) that the law of Archinus originally contemplated only public actions.

[4] That δικάζεσθαι properly refers to private litigation is clearly brought out in Dem. 21. 26; 22. 27; Lys. 1. 44; 13. 65; [And.] 4. 35. Furthermore, throughout the orators the exact meaning of the term is observed with a scrupulous nicety that effectually precludes any possibility of interpreting it loosely in a legal enactment. The writer has been unable to find any instance of its use which would justify us in so understanding it here as even to include public actions. The only departures from the strict usage noted above are a few instances where the word is used metaphorically, and the figure has every appearance of having been drawn from the field of civil litigation (cf. [Dem.] 7. 8; 59. 115; Dem. 24. 121).

[5] Ar. *Cons. Ath.* 40. 1–2. [6] *Ibid.*, 2.

prosecutions so mild a penalty as that provided in this law; that the man who had put to death, almost with his own hand, one who attempted to violate the amnesty would have been satisfied to mulct offenders of a class which he so heartily detested only in the ἐπωβελία? It is incredible. We are forced to the conclusion that the law was not intended to apply to public actions, which were sufficiently regulated by the enactments cited by Andocides, but was supplementary to those enactments and had for its purpose merely to check the activities of sycophants and to discourage the flood of civil litigation that impended, much of which came perilously near to violating the amnesty. The influence which public opinion exerted on the magistrates whose duty it was to receive accusations appears to have proved a sufficient safeguard for those who were attacked in public actions on political grounds,[1] save in such cases as that of the notorious informer Agoratus.[2] However, a further obstacle apparently was opposed to the use of the courts as a means of satisfying old political grudges by requiring magistrates to take an oath to the effect that they would not receive any action or indictment based on acts committed prior to the archonship of Euclides, except in the case of the exiles.[3]

Taking these conclusions with the fact that we have no case of παραγραφή in any public cause, the writer is inclined to believe that it was employed only in private actions. As regards διαμαρτυρία the

[1] The ἔνδειξις against Philon apparently was not permitted to come into court (Isoc. 18. 22). As late as 382 an attempt to prevent Evander from becoming archon on the ground of his alleged connection with the Thirty was unsuccessful (Lys. *Orat.* 26; cf. Jebb, *Attic Orators*, I, 238). In the case of Andocides it may be remarked that, since he was charged simply with impiety in having entered the Eleusinian temple (Jebb, *op. cit.*, I, 112–13), the relation of the charge to his earlier offenses may not have been so apparent as to justify the magistrate in refusing to receive it. There can be little doubt that public opinion favored the defendant (Jebb, *op. cit.*, pp. 114–15).

[2] There is reason to believe that the Eleven favored the accusation when they permitted an ἀπαγωγή and prompted the insertion of the words ἐπ' αὐτοφώρῳ in the charge (Lys. 13. 85 ff.), for this form of accusation was in strict law not applicable to the circumstances.

[3] Andocides states (1. 91) that after the restoration the βουλή always included in their oath the following clause: καὶ οὐ δέξομαι ἔνδειξιν οὐδὲ ἀπαγωγὴν ἕνεκα τῶν πρότερον γεγενημένων πλὴν τῶν φυγόντων. From this it seems likely that a similar obligation was required on the part of all magistrates who received public actions. The exception πλὴν τῶν φυγόντων bears out the suggestion the writer has advanced that the law which this oath was intended to confirm was understood in connection with the resolution of Patroclides (And. 1. 78; cf. above, p. 182).

problem is more difficult, for we are confronted by a scarcity of evidence that makes definite conclusions impossible. Διαμαρτυρία may well have been better adapted to public actions than παραγραφή,[1] and the fact that it involved ἐπωβελία does not, as in the case of παραγραφή, afford any ground for conclusions.[2] But the evidence for its admissibility is of the most doubtful character,[3] and the fact remains that we have no instance of a διαμαρτυρία in a public action. Where the evidence is so slight, it would be unsafe to attempt any positive solution, but the writer is inclined to believe that the practice of interposing special pleas originated and developed solely in connection with civil litigation and was never at any time extended to public actions. All that we know of the legislative program that followed the restoration and of later procedure points to this conclusion.

UNIVERSITY OF CALIFORNIA

[1] Because it could be so worded as to make the exact ground of the exception a "matter of record," which could easily be brought again before a court by merely producing the original witness (cf. above, pp. 176 f.).

[2] In διαμαρτυρία the ἐπωβελία would be computed on the fine proposed in the δίκη ψευδομαρτυρίων, a private suit.

[3] This evidence is discussed by Lipsius in *MSL* (p. 841, n. 212), and with very different conclusions in *Recht* (p. 858). The writer is inclined to accept Lipsius' later judgment.